

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

8 SAMISONI TAUKITOKU,)
9 Petitioner,)
10 v.)
11 TIMOTHY FILSON, et al.)
12 Respondents.)
13)
3 : 16-cv-00762-HDM-WGC
ORDER

14 This counseled habeas petition comes before the court on
15 petitioner's third motion for discovery (ECF No. 32). Respondents have
16 opposed (ECF No. 36), and petitioner has replied (ECF No. 37).

17 Petitioner in this action challenges his state court judgment of
18 conviction, pursuant to jury trial, of three counts of murder with a
19 deadly weapon and four counts of assault with use of a deadly weapon.
20 (ECF No. 19 at 2-3). The court previously granted petitioner leave
21 to conduct discovery to obtain his criminal case materials from the
22 District Attorney's office. Petitioner now asks the court to order
23 the Washoe County Crime Lab to release the materials underlying the
24 State expert's evaluation of the ballistics recovered in the case.

25 The charges against petitioner arose from events that took place
26 on October 28, 2007.¹ After several fights broke out during a

¹ The court's summary is drawn from the pleadings and the court's independent preliminary review of the record. The summary is intended only for the purpose of deciding the instant motion for discovery and is not adopted for any other purpose in this habeas proceeding, including but not

1 Halloween house party on that night, shots were fired, and three
2 people died. At one point during the fights, petitioner brandished a
3 firearm in the house and threatened another person. He later fired
4 several shots outside. Eyewitness testimony was presented that
5 petitioner shot one or two people, including victim Charles Coogan
6 Kelly. (See Ex. 16 (Tr. 35 (identifying the victim in Exhibit 3 as
7 Kelly); Ex. 18 (Tr. 357 (testifying that she saw petitioner shoot the
8 man in Exhibit 3); Ex. 19 (Tr. 546) (testifying that he saw petitioner
9 shoot one or two people)).² Sali Manu, who was charged alongside
10 petitioner, was also seen brandishing a gun. Petitioner and Manu were
11 arrested as they drove away from the party. Firearms were recovered
12 from both.

13 Another partygoer, Andre Lawson, testified that he fired two
14 warning shots into the air when fighting broke out. Manu did not
15 testify, and no evidence was presented at trial that he had fired any
16 shots. There was no evidence at trial of any shots other than those
17 fired by Lawson and petitioner.

18 The State's ballistics expert, Kevin Lattyak, compared the
19 projectiles, casings and fragments recovered from the scene to
20 petitioner's, Manu's and Lawson's firearms. Lattyak testified that
21 with the exception of two or three projectiles or fragments, the
22 remaining ballistics evidence either positively matched petitioner's
23 gun or was consistent with petitioner's gun. Lattyak further testified
24 that none of the bullets recovered could have come from a .32, which
25 is the weapon Manu had, because they were too big. Two bullets
26

27 limited to adjudication of the merits of the petition.

28 ² The trial transcripts are located at ECF No. 40.

1 recovered from the body of Charles Coogan Kelly were postiviely
2 matched to petitioner's gun. A projectile recovered from Derek
3 Jensen's body bag was positively matched to petitioner's gun. No
4 bullets were recovered from the body or body bag of the third victim,
5 Nathan Viljoen.

6 During an investigation for the instant habeas petition, counsel
7 located and obtained declarations from several eyewitnesses who claim
8 they saw persons other than petitioner fire shots during the fights.
9 (ECF No. 33 Exs. 5-10). One person observed Lawson fire six to seven
10 rounds toward the house from the street. (Ex. 5). Another person also
11 saw a person standing in the street, shooting six to eight rounds
12 toward the house, and that person did not match petitioner's
13 description. (Ex. 6). Another witness, who refused to go on the record
14 with petitioner's counsel but whose observation was at least partially
15 reported to police, also saw a man wearing a shirt similar to that
16 Lawson wore that night shooting toward the house. (Exs. 11 & 12). One
17 person avers he saw someone fitting the description of Manu shoot
18 toward the garage during the fight and that he "knew [that person]
19 killed DJ because [he] saw DJ collapse near the garage door." (Ex. 8).
20 These reports, petitioner argues, call into question Lattyak's
21 conclusion that "virtually all of the bullets and shell casings,
22 including those recovered from the victims' bodies, matched or were
23 very similar to those from [petitioner's] firearm." (ECF No. 32 at 4).
24 Petitioner argues that in light of the evidence that two other people
25 fired shots during the fight,³ the ballistics evidence must be

27 ³ While, as noted, there was evidence at trial that Lawson had fired
28 shots, the evidence was that he had shot into the air; now petitioner has
uncovered several witnesses saw Lawson, or someone matching his description,
fire shots at the house.

1 subjected to adversarial testing. To that end, petitioner seeks
2 release of Lattyak's bench notes and photographs, on which he based
3 his report, as well as the physical evidence itself, for review by an
4 independent expert. (ECF No. 32 at 3).

5 "A habeas petitioner does not enjoy the presumptive entitlement
6 to discovery of a traditional civil litigant." *Rich v. Calderon*, 187
7 F.3d 1064, 1068 (9th Cir. 1999) (citing *Bracy*, *Bracy v. Gramley*, 520
8 U.S. 899, 903-05). Discovery in habeas matters is governed by Rule 6
9 of the Rules Governing Section 2254 Cases in the United States
10 District Courts, which states: "A party shall be entitled to invoke
11 the processes of discovery available under the Federal Rules of Civil
12 Procedure if, and to the extent that, the judge in the exercise of his
13 discretion and for good cause shown grants leave to do so, but not
14 otherwise."

15 The Supreme Court has construed Rule 6, holding that if through
16 "specific allegations before the court," the petitioner can "show
17 reason to believe that the petitioner may, if the facts are fully
18 developed, be able to demonstrate that he is . . . entitled to relief,
19 it is the duty of the court to provide the necessary facilities and
20 procedures for an adequate inquiry." *Bracy*, 520 U.S. at 908-09
21 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). This inquiry is
22 informed by the essential elements of the claims for which petitioner
23 seeks discovery. *Id.* at 904. Thus, the purpose of discovery in a
24 habeas proceeding is not to develop new claims, but, rather, to
25 develop factual support for specific allegations contained in existing
26 claims. See also *Rich*, 187 F.3d at 1067 ("Habeas is an important
27 safeguard whose goal is to correct real and obvious wrongs. It was
28 never meant to be a fishing expedition for habeas petitioners to

1 'explore their case in search of its existence.'"). Moreover,
2 additional factors may influence whether the court grants leave to
3 conduct discovery. See, e.g., *Sherman v. McDaniel*, 333 F. Supp. 2d
4 960, 969 (D. Nev. 2004) (noting that the court, in exercising its
5 discretion under Rule 6, should take into consideration whether the
6 claims to which petitioner's proposed discovery relates are exhausted
7 in state court).

8 Petitioner asserts that the discovery sought is in aid of
9 developing Grounds Four and Eight of the First Amended Petition. In
10 Ground Four, petitioner alleges that his trial counsel was ineffective
11 for failing to investigate his case, including by failing to obtain
12 a ballistics expert. (ECF No 19 at 14-15). And in Ground Eight,
13 petitioner asserts that the trial court violated his rights to due
14 process and a fair trial by denying defense counsel's motions to
15 continue trial. (*Id.* at 25-27). Petitioner admits that both of these
16 claims are unexhausted.

17 Respondents argue that petitioner should be required to pursue
18 discovery as to these unexhausted claims in the state courts first.
19 They further argue that under *Cullen v. Pinholster*, 563 U.S. 170
20 (2011), the court's review is limited to the state court record and
21 that discovery is improper unless the petitioner can show the evidence
22 would be admissible in an evidentiary hearing.

23 The court agrees that because petitioner seeks discovery only
24 with respect to unexhausted claims, these claims, and their related
25 discovery, should be pursued in the state court in the first instance.
26 The motion for discovery will therefore be denied. However, the court
27 would likely be inclined to grant petitioner a motion to stay and abey
28 should he wish to pursue Grounds Four and/or Eight in state court

1 before proceeding further in this action.

2 In accordance with the foregoing, IT IS THEREFORE ORDERED that
3 petitioner's third motion for discovery (ECF No. 32) is DENIED WITHOUT
4 PREJUDICE.

5 IT IS FURTHER ORDERED that petitioner will have thirty days from
6 entry of this order to either file a second amended petition or move
7 for other appropriate relief, including but not limited to a motion
8 to stay and abey.

9 IT IS SO ORDERED.

10 DATED: This 9th day of April, 2019.

Howard D McKibben

HOWARD D. MCKIBBEN
UNITED STATES DISTRICT JUDGE